

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALBERT GONZALEZ	:	DETERMINATION
	:	DTA NO. 819420
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law for the	:	
Period October 4, 2001.	:	

Petitioner, Albert Gonzalez, P.O. Box 115, Prospect, Virginia 23960, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law for the period October 4, 2001.

A small claims hearing was held before Arthur S. Bray, Presiding Officer, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on July 20, 2004 at 1:15 P.M. Petitioner appeared *pro se*. The Division of Taxation appeared by Mark F. Volk, Esq. (John Walther).

The final brief in this matter was due by September 24, 2004, and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether petitioner was a person in possession of or had control of unlawfully stamped cigarettes and, as such, is liable for the penalty imposed pursuant to Tax Law § 481(1)(b).

FINDINGS OF FACT

1. On May 18, 2001, Division of Taxation Investigators Pineda and Anderson received an anonymous telephone call stating that an individual was selling Virginia stamped cigarettes from the trunk of his automobile. The complainant identified the type of automobile, described the license plate and provided a telephone number and pager number where the purported seller could be reached for the purchase of cigarettes at \$27.00 a carton.

2. Upon checking the license plate, the investigators found that the automobile was registered in Virginia to Albert S. Gonzalez and Patricia L. Gee. They also found that the telephone numbers they received were listed in the name of Patricia Gee.

3. In June 2001, the investigators received a business card in the mail which they believed confirmed what the anonymous complainant had told them about an individual who was dealing in cigarettes. The words “‘THE CIGARETTE MAN’ (DISCOUNT CIGARETTES)” appeared at the top of the card which contained a drawing of a lit cigarette in an ashtray. The card directed people to ask for Al or Pat and provided a telephone number and beeper number.

4. On the morning of June 25, 2001, Investigator Pineda had a telephone conversation with petitioner who stated that he had 25 cartons of Marlboro cigarettes and that the price was \$27.00 a carton. Investigator Pineda asked for 10 cartons and petitioner responded that the cost would be \$270.00. At approximately 11:00 A.M., petitioner and Investigator Pineda had another conversation wherein they agreed to meet in a certain parking lot in order for Investigator Pineda to purchase the ten cartons of cigarettes. However, petitioner did not appear at the designated location and the transaction was not completed.

5. On numerous occasions, the investigators conducted a surveillance of the area where the cigarettes were purportedly being sold from the trunk of an automobile. However, the investigators never located the vehicle.

6. On August 3, 2001, at approximately 10:00 A.M., Investigator Pineda had a telephone conversation with petitioner during which Investigator Pineda asked petitioner for cigarettes. Petitioner replied that he had four cartons of Newport cigarettes remaining. Investigator Pineda asked for the cost of the cartons and petitioner replied that it would be \$108.00. At approximately 1:00 P.M. the sale was consummated at a designated location. The cigarettes bore a Virginia stamp. An arrest was not made at this time.

7. The tragic events of September 11, 2001 resulted in the loss of a number of members of the bureau which was conducting this investigation. As a result, the investigation was in a hiatus until October 2001.

8. On October 4, 2001, at approximately 9:45 A.M., Senior Investigator Muller, accompanied by Investigators Mercado and Anderson, made a telephone call to "THE CIGARETTE MAN." At this time, Senior Investigator Muller made arrangements to purchase cigarettes at a particular location. At approximately 3:00 P.M., Investigator Mercado met with petitioner who showed Investigator Mercado a list of the stock of his cigarettes and offered to sell 98 cartons of cigarettes at a price of \$27.00 a carton. Investigator Mercado asked petitioner if he had any additional cartons of cigarettes and petitioner responded that he did in his apartment. Petitioner then went to an apartment and emerged with three additional cartons of cigarettes. At this juncture, petitioner escorted Investigator Mercado to his automobile and opened the trunk revealing numerous cartons of cigarettes. Thereafter, Investigator Mercado signaled other investigators who were standing nearby. After being advised of his rights,

petitioner stated, among other things, that he purchased cigarettes in Virginia and sold them in New York.

9. Petitioner was arrested for the possession of Virginia stamped cigarettes and later pled guilty to disorderly conduct. He was fined and spent eight days in jail.

10. The Division of Taxation ("Division") issued a Notice of Determination (assessment number L-020597676-7), dated February 4, 2002, which asserted that a penalty was due under Article 20 of the Tax Law in the amount of \$14,400.00. The penalty was based on the finding that petitioner was in possession and control of 101 cartons of Virginia stamped cigarettes and was calculated by multiplying \$150.00 a carton by the 96 cartons over the allowed limit of 1,000 cigarettes.

11. The investigators wanted to purchase more than a 100 cartons of cigarettes from petitioner in order to charge him with a felony. Consequently, when the investigators contacted petitioner by telephone, they repeatedly requested more than 100 cartons of cigarettes. At first petitioner declined, but then subsequently relented because of the repeated requests.

12. The Division issued assessment number L-020587601 which asserted a penalty in the amount of \$2,000.00 on the basis that petitioner did not possess a valid New York State Certificate of Registration to sell cigarettes. A Consolidated Statement of Liabilities showed that, as of February 24, 2003, petitioner paid \$700.00 toward assessment number L-020587601, which is not at issue in this proceeding. The balance of the \$2,000.00 penalty was paid by a check dated February 6, 2003.

SUMMARY OF PETITIONER'S POSITION

13. At the hearing, petitioner acknowledged that he brought cartons of cigarettes from Virginia to New York in order to sell them to friends in a bar. According to petitioner, when he

came to New York he would bring 10 cartons with him and sell a limited number of cartons of cigarettes at a time. Petitioner submits that he received numerous telephone calls from the investigators asking for 100 cartons so that he would be convicted of a felony. At first petitioner declined to provide this quantity of cigarettes, but he eventually relented because of the repeated requests. Petitioner believes that he was harassed and coerced into providing 100 cartons and that he was not arrested after the first sale because the investigators wanted a “big sting.” It is contended that the conduct of the investigators constituted entrapment.

14. Petitioner submits that he never sold cartons of cigarettes out of his car and that the business cards were printed up on his computer as a joke. He also notes that he paid dearly for his conviction. He was fined by the court and spent time in jail.

15. At the hearing, petitioner argued that he already paid \$2,000.00 toward the assessment at issue in this matter and that the amount of tax asserted to be due should be reduced by this amount.

CONCLUSIONS OF LAW

A. During the period in issue, Tax Law § 481(1)(b) provided, in pertinent part, as follows:

In addition to any other penalty imposed by this article, the commissioner of taxation and finance may impose a penalty of not more than one hundred fifty dollars for each two hundred cigarettes or fraction thereof in excess of one thousand cigarettes in unstamped or unlawfully stamped packages in the possession or under the control of any person . . .

B. Petitioner’s claim that the conduct of the investigators constituted entrapment is without merit. The record clearly establishes that petitioner made a regular practice of transporting contraband cigarettes from Virginia to New York. Additionally, the evidence shows that petitioner passed out business cards which were used to conduct business and that when the

number on the card was called by investigators, petitioner was willing to sell contraband cigarettes. Further, during the telephone call of June 25, 2001, petitioner stated that he had 25 cartons of cigarettes available. Clearly, petitioner made a practice of traveling with more than 10 cartons of cigarettes and the explanation he offered of his activities was incomplete. There is no reasonable view of the evidence by which one could conclude that petitioner was actively induced to engage in criminal activity as opposed to merely being afforded an opportunity to do so (Penal Law § 40.05; *see, People v. Brown*, 82 NY2d 869, 871-872, 609 NYS2d 164, 165; *People v. Moultrie*, 5 AD3d 241, 242; 773 NY2d 287; *People v. Abbott*, 275 AD2d 481, 482, 711 NYS2d 611, 613, *lv denied* 96 NY2d 731, 722 NYS2d 798). It is also noted that, at this juncture, it is irrelevant whether petitioner sold cigarettes from his automobile.

C. The record establishes that the penalty at issue in this matter is unrelated to the penalty for which petitioner paid \$2,000.00. Therefore, he is not entitled to a credit for the \$2,000.00 which was previously paid.

D. The petition of Albert Gonzalez is denied and the penalty asserted in the Notice of Determination, dated February 4, 2002, is sustained.

DATED: Troy, New York
October 21, 2004

/s/ Arthur S. Bray
PRESIDING OFFICER